IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

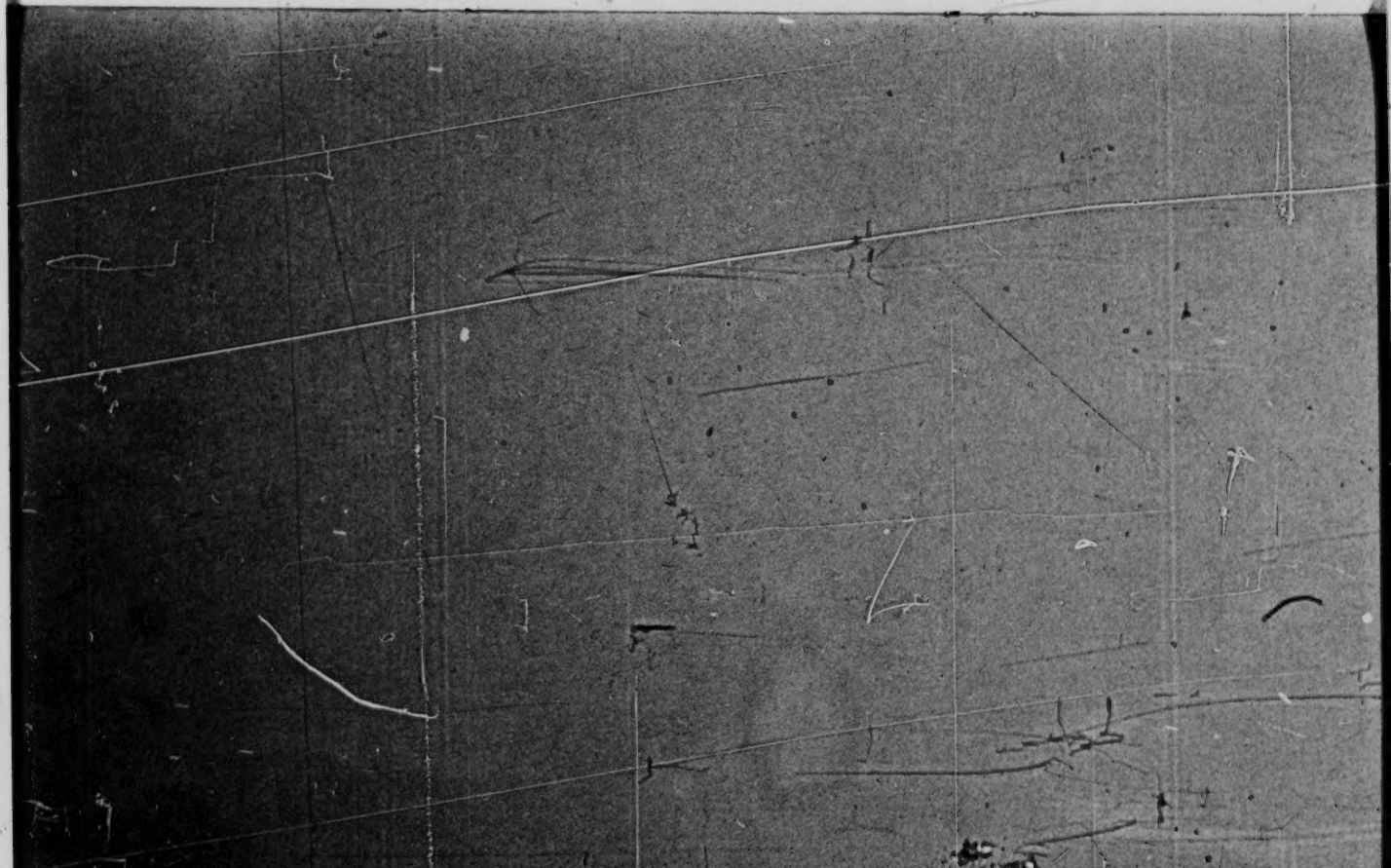
On Appeal from the Supreme Court of the State of Mississippi

MOTION TO REVIEW AND RESCIND ORDER OF DECEMBER 17, 1973

JOHN McQUISTON, II
Goodman, Glazer, Strauch & Schneider
1400 Commerce Title Building
Memphis, Tennessee 38103
Attorneys for Appellant

TENNESSEE LAW PRINTERS, P. O. Box 97, Knoxville, Tennessee, Phone 525-6261

2-21-74-60



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant

v.

BEN E. PITTMAN,
Appellee

On Appeal from the Supreme Court of the State of Mississippi

MOTION TO REVIEW AND RESCIND ORDER OF DECEMBER 17, 1973

Appellant, Allenberg Cotton Company, Inc., herewith moves the Court to review and rescind its order of December 17, 1973, which order provides:

> Consideration of the jurisdictional statement is deferred to accord counsel for appellant opportunity to secure a certificate from the Supreme Court of Mis-

sissippi as to whether the judgment herein was intended to rest on an adequate and independent state ground or on federal grounds. *Charleston Federal Savings & Loan Association, et al v. Alderson, State Tax Commissioner*, 324 U.S. 182, 186 n. 1 (1945).

Appellant, Allenberg, contends that this determination is unnecessary.

In this appeal Allenberg Cotton Company argues that the burdensome effect of the decision of the Mississippi Supreme Court violates the Commerce Clause. It is the effect of the Mississippi decision which is challenged, not the particular reasoning of the Mississippi Supreme Court. Appellant Allenberg respectfully contends that whether or not the Mississippi Supreme Court states there was an independent state ground for the decision, the decision would nevertheless be subject to challenge on the ground that its effect will place an undue burden on interstate commerce in violation of the Commerce Clause.

This Court stated in *Corn Products Refining Co. v. Eddy*, 249 U.S. 428, at 432 (1919):

> We turn to the questions raised under the commerce clause and the act of Congress.
>
> Although the supreme court in its opinion said nothing about interstate commerce, it cannot be doubted, in the state of the record, that defendants' activities against which relief was sought included incidental interference with plaintiff's interstate commerce in the "Mary Jane" syrup; and that the general judgment in favor of defendants amounts to an adjudication that the state law and regulations are to be enforced with respect to plaintiff's product indiscriminately, not only when sold and offered for sale in domestic commerce, but also while in the hands of the importing

dealers for sale in the original packages, and hence, in contemplation of law, still in the course of commerce from state to state. The silence of the supreme court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state.

The Court then went on to consider the Commerce Clause question in the *Corn Products* case.

Under *Corn Products* it would appear unnecessary to raise the Commerce Clause question below. However, it is not necessary for this Court to so hold in this case because Allenberg has obtained a certificate from the Mississippi Supreme Court which states that arguments relating to the Commerce Clause were made and considered in the state court. In his Motion to Dismiss or Affirm (page 5), Pittman (Appellee) argues that the certificate obtained is not the certificate of the state court, but is merely the certificate of the Chief Justice of the Mississippi Supreme Court and for that reason does not comply with the requirements of *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945). However, the certificate obtained shows on its face that it is the certificate of the Mississippi Supreme Court and not merely that of one Justice. The certificate states: "On application of the appellee, Allenberg Cotton Company, Inc., *this Court*, in addition to the orders made herein, *hereby certifies* and makes a part of the record in this case. . ." Jurisdictional Statement, p. A 12.

Therefore, there should be no need to return to the Mississippi Supreme Court for further clarification of the certificate.

Alternatively, for the reasons set out above, in an appeal raising a Commerce Clause question, the rule of *Herb v. Pitcairn*, *supra*, does not apply. *Herb v. Pitcairn* applies only in that class of cases where it is necessary to show that the necessary ground for the decision was an interpretation of federal constitutional law. In Commerce Clause cases such a showing is unnecessary because it is the unconstitutional effect of the decision which is challenged, not the reasoning of the court below.

CONCLUSION

For the foregoing reasons the appellant Allenberg respectfully requests this Court to review its order of December 17, 1973, and to rescind it.

Respectfully submitted,

JOHN McQUISTON, II
Goodman, Glazer, Strauch & Schneider
1400 Commerce Title Building
Memphis, Tennessee 38103